

CHRISTOPHER J. BORDERS (SBN 135901)
HINSHAW & CULBERTSON LLP
One California Street, 18th Floor
San Francisco, California 94111
Telephone: 415-362-6000

DAVID R. CREAGH (Admitted *Pro Hac Vice*)
DAVID J. RICHARDS (Admitted *Pro Hac Vice*)
STEVEN M. PUISZIS (Admitted *Pro Hac Vice*)
CLIFFORD E. YUKNIS (Admitted *Pro Hac Vice*)
HINSHAW & CULBERTSON LLP
222 North LaSalle Street, Suite 300
Chicago, Illinois 60601-1081
Telephone: 312-704-3000

Attorneys for Defendants
TERMINIX INTERNATIONAL, INC., ET AL.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

BARBARA NEU on behalf of herself and all) **Case No.: C 07-06472-CW**
others similarly situated,)

Plaintiff,)

vs.)

TERMINIX INTERNATIONAL, INC., THE)
TERMINIX INTERNATIONAL COMPANY,)
THE SERVICEMASTER COMPANY,)
SERVICEMASTER CONSUMER SERVICES,)
SERVICEMASTER CONSUMER SERVICES)
LIMITED PARTNERSHIP,)

Defendants.)

**ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF'S AMENDED
COMPLAINT**

Defendants, TERMINIX INTERNATIONAL, INC., THE TERMINIX
INTERNATIONAL COMPANY LIMITED PARTNERSHIP, THE SERVICEMASTER
COMPANY, SERVICEMASTER CONSUMER SERVICES, INC., and SERVICEMASTER
CONSUMER SERVICES LIMITED PARTNERSHIP, state the following for their Answer and

1 Affirmative Defenses to plaintiff's Amended Complaint:

2 **I. INTRODUCTION**

3 1. Named Plaintiff was the victim of an overall illegal and unfair business practice,
4 scheme or plan directed at the heart of the service Defendants were in the business of providing:
5 eliminating and preventing subterranean termite infestation by use and maintenance of proper
6 eradication and control measures based upon expertise as regulated and licensed termite control
7 operators. Defendant did not provide this basic service to customers as a matter of business
8 practice in the State of California, including to Plaintiff. Minor differences in contract terms
9 between class members are mere variations on the overall theme of not providing the basic
10 service they are in a regulated business which requires expertise to provide. Plaintiff Neu's
11 contract contains the basic pledge that Defendants "... will provide the necessary services ... to
12 control or protect against subterranean (ground) termites ..." (See Exhibit 1).

13 **ANSWER:** Defendants deny the allegations contained in Paragraph 1 of plaintiff's
14 Amended Complaint.

15 2. The business scheme alleged herein has resulted in settlements by Defendants
16 with Attorneys General in several States. Defendants settled deceptive trade practice claims with
17 states that required wholesale application or reapplication of termite control measures in Florida
18 (See Exhibit 2) and Kentucky (See Exhibit 3) wherein it was alleged that Terminix did not
19 provide the necessary services to control or protect against subterranean (ground) termites.
20 Terminix agreed with the Alabama Department of Agriculture and Industries to begin making
21 annual termite inspections. (See Exhibit 4).

22 **ANSWER:** Defendants deny the allegations contained in Paragraph 2 of plaintiff's
23 Amended Complaint.

24 3. This action arises out of the pattern and practice by Defendants of failing to
25 provide the subterranean termite prevention and control services they are required to provide by
26 statute, labels, good entomologic practice and contracts; collecting fees for installation and
27 maintenance of chemical barriers without fully applying or maintaining the barrier when they

1 knew that this was the only way to prevent termite infestations; selling services and products
2 which they knew to be ineffective for preventing termite infestation including baiting systems;
3 and of taking advantage of customers' lack of knowledge by suppressing this information to
4 generate income without providing services. Plaintiff and class members intended to purchase
5 termite prevention services from Defendants and never received these services.

6 **ANSWER:** Defendants deny the allegations contained in Paragraph 3 of plaintiff's
7 Amended Complaint.

8 4. Such a scheme is in violation of the Business and Professions Code Sections
9 17200 & 17500, California Consumer Legal Remedies Act, California Civil Code §§ 1750 -
10 1784, in breach of express and implied contracts, and common law obligations with Plaintiff and
11 other similarly situated persons.

12 **ANSWER:** Defendants deny the allegations contained in Paragraph 4 of plaintiff's
13 Amended Complaint.

14 II. **PARTIES**

15 5. Plaintiff is an adult resident citizen of Alameda County, State of California,
16 currently residing at 16073 Gramercy Drive, San Leandro, California, 94578.

17 **ANSWER:** Defendants have insufficient knowledge upon which to base a belief as to
18 the truth or falsity of the allegations contained in Paragraph 5 of plaintiff's Amended Complaint
19 and therefore, deny same and demand strict proof thereof.

20 6. Plaintiff is informed and believes and thereon alleges that The Terminix
21 International Company, LP, is or was a Delaware limited partnership based in Wilmington,
22 Delaware, and located at 1209 Orange Street, Wilmington, Delaware, 19801, with its principal
23 place of business in Memphis, Tennessee, that registered in California on February 3, 1987, and
24 is routinely conducting business in California.

25 **ANSWER:** Defendants admit that The Terminix International Company Limited
26 Partnership is a limited partnership organized under the laws of the State of Delaware, that its
27 principal place of business is located in Memphis, Tennessee, and that it conducts business in the
28

1 State of California. Further responding, Defendants deny all remaining allegations contained in
2 Paragraph 6 of plaintiff's Amended Complaint.

3 7. Plaintiff is informed and believes and thereon alleges that Terminix International,
4 Inc., is or was a Delaware corporation with its principal place of business in Memphis,
5 Tennessee, and located at 860 Ridge Lake Boulevard, Memphis, Tennessee, 38120, that
6 registered in California on February 4, 1987, and is routinely conducting business in California.
7 Terminix International, Inc. is the general partner of Terminix International, LP.

8 **ANSWER:** Defendants admit that Terminix International, Inc. is a corporation
9 organized under the laws of the State of Delaware, that its principal place of business is located
10 at 860 Ridge Lake Boulevard in Memphis, Tennessee, and that it conducts business in the State
11 of California. Defendants further admit that Terminix International, Inc. is the general partner of
12 The Terminix International Company Limited Partnership. Further responding, Defendants deny
13 all remaining allegations contained in Paragraph 7 of plaintiff's Amended Complaint.

14 8. Plaintiff is informed and believes and thereon alleges that The ServiceMaster
15 Company is a Delaware corporation, incorporated on September 10, 1991, based in Memphis,
16 Tennessee, and located at 860 Ridge Lake Blvd, Memphis, Tennessee, 38120, that is routinely
17 conducting business in California. Service Master represents itself as a "Fortune 500 Company
18 that's \$3.5 billion strong."

19 **ANSWER:** Defendants admit that The ServiceMaster Company is a corporation
20 organized under the laws of the State of Delaware, that its principal place of business is located
21 at 860 Ridge Lake Boulevard in Memphis, Tennessee, and that it conducts business in the State
22 of California. Further responding, Defendants admit that certain of Terminix's sales and renewal
23 literature make certain references to support provided by ServiceMaster to Terminix, and the
24 terms of such documents speak for themselves. Further responding, Defendants deny all
25 remaining allegations contained in Paragraph 8 of plaintiff's Amended Complaint.

26 9. Plaintiff is informed and believes and thereon alleges that ServiceMaster
27 Consumer Services, Inc., is or was a Delaware corporation based in Memphis, Tennessee, and
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1 located at 860 Ridge Lake Boulevard, Memphis, Tennessee, 38120, that registered in California
2 on March 14,2002, and is routinely conducting business in California.

3 **ANSWER:** Defendants admit that ServiceMaster Consumer Services, Inc. is a
4 corporation organized under the laws of the State of Delaware, that its principal place of business
5 is located at 860 Ridge Lake Boulevard in Memphis, Tennessee, and that it conducts business in
6 the State of California. Further responding, Defendants deny all remaining allegations contained
7 in Paragraph 9 of plaintiff's Amended Complaint.

8 10. Plaintiff is informed and believes and thereon alleges that ServiceMaster
9 Consumer Services Limited Partnership is or was a Delaware limited partnership based in
10 Wilmington, Delaware, and located at 1209 Orange Street, Wilmington, Delaware, 19801, that
11 registered in California on November 3, 1994, and is routinely conducting business in California.

12 **ANSWER:** Defendants admit that ServiceMaster Consumer Services Limited
13 Partnership is a limited partnership organized under the laws of the State of Delaware, that its
14 principal place of business is located in Memphis, Tennessee, and that it conducts business in the
15 State of California. Further responding, Defendants deny all remaining allegations contained in
16 Paragraph 10 of plaintiff's Amended Complaint.

17 11. The term "Plaintiff(s)" as used in this complaint means and includes all persons
18 and entities listed and named as Plaintiff in the caption of this complaint, or any amendment
19 thereto, and in the text paragraphs thereof, and include any Plaintiff hereafter added by
20 amendment, joinder or intervention. The term "Plaintiff(s)" also means and includes both the
21 named Plaintiff individually and as representative of the class and any subclass herein described,
22 as well as each member of such class and any subclass.

23 **ANSWER:** Defendants state that the allegations contained in Paragraph 11 of
24 plaintiff's Amended Complaint consist of conclusions of law requiring no response. To the
25 extent said allegations are construed as requiring a response, Defendants deny said allegations.

26 12. The term "Defendant" as used in this complaint means and includes all persons
27 and entities listed and named as a Defendant in the caption of this complaint or any amendment
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1 thereto and in the text paragraphs thereof, and includes any Defendant hereafter added by
2 amendment or otherwise (unless otherwise specified in the amendment).

3 **ANSWER:** Defendants state that the allegations contained in Paragraph 12 of
4 plaintiff's Amended Complaint consist of conclusions of law requiring no response. To the
5 extent said allegations are construed as requiring a response, Defendants deny said allegations.

6 13. Plaintiff informed and believes and thereon alleges that Defendants The Terminix
7 International Company, LP, and Terminix International, Inc., (hereinafter collectively
8 "Terminix" or the "Terminix Defendants") sell and claim to provide termite protection services
9 throughout California. The Terminix International Company, LP, is the sales and service
10 provider for the individual customers who have entered into binding contracts with The Terminix
11 International Company, LP, and/or Terminix International, Inc., by and through The Terminix
12 International Company, LP. The Terminix International Company, LP, is part of a group of
13 service providers along with Merry Maid, Furniture Medic, ARS, American Home Shield, and
14 TruGreen ChemLawn that make up the ServiceMaster Group. Terminix International, Inc., is the
15 general partner of The Terminix International Company, LP. Defendant ServiceMaster
16 Consumer Services, LP is the immediate parent to both of the Terminix Defendants and The
17 ServiceMaster Company is the ultimate Parent.

18 **ANSWER:** Defendants admit that The Terminix International Company Limited
19 Partnership conducts business in California which includes the provision of termite protection
20 services through agreements which it enters into with its customers. Defendants further admit
21 that Terminix International, Inc. is a general partner of The Terminix International Company
22 Limited Partnership. Further responding, the remaining allegations contained in Paragraph 13 of
23 plaintiff's Amended Complaint consist of conclusions of law requiring no response. To the
24 extent said allegations are construed as requiring a response, Defendants deny said allegations.

25 14. Plaintiff is informed and believes and thereon alleges that The ServiceMaster
26 Company, ServiceMaster Consumer Services, Inc., and/or ServiceMaster Consumer Services
27 Limited Partnership (hereinafter collectively "ServiceMaster" or the "ServiceMaster
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1 Defendants") claim and report all of Terminix's assets and liabilities as part of its overall annual
2 financial reporting.

3 **ANSWER:** Defendants deny the allegations contained in Paragraph 14 of plaintiff's
4 Amended Complaint.

5 15. The ServiceMaster Defendants, by and through their executive officers and
6 executive board, directly participate, guide, and manage all of the activities of the Terminix
7 Defendants through active and direct participation in the managerial affairs of the Terminix
8 Defendants.

9 **ANSWER:** Defendants deny the allegations contained in Paragraph 15 of plaintiff's
10 Amended Complaint.

11 16. Upon information and belief and by their own admissions, Terminix is for all
12 legal and practical purposes a mere department or "business unit" of Service Master, is the alter
13 ego of ServiceMaster, and/or acts as ServiceMaster's general agent (See Exhibit 5, Noblin
14 testimony).

15 **ANSWER:** Defendants state that the allegations contained in Paragraph 16 of
16 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
17 said allegations are construed as requiring a response, Defendants deny said allegations.

18 17. Upon information and belief and by their own admissions, ServiceMaster
19 manages all risk related services and liabilities of Terminix, including duties that arise from
20 Terminix's termite services such as claims for termite damage made by Terminix's customers
21 (See Exhibit 5).

22 **ANSWER:** Defendants deny the allegations contained in Paragraph 17 of plaintiff's
23 Amended Complaint.

24 18. Upon information and belief, ServiceMaster is responsible for managing
25 Terminix's liabilities including the paying of termite damage claims made by Terminix's
26 customers (See Exhibit 6, ServiceMaster Settlement Check (Redacted) for Terminix
27 International, L. P. in Dickens v Terminix International, L.P.

1 **ANSWER:** Defendants deny the allegations contained in Paragraph 18 of plaintiff's
2 Amended Complaint.

3 19. Upon information and belief, Terminix and ServiceMaster represent in form
4 renewal solicitations and invoices that all of Terminix's legal obligations are "backed by"
5 ServiceMaster which means it is a co-maker, guarantor, or surety of the obligations rather than
6 disinterested third-party with no obligations to the consumer; specifically: "you can feel safer
7 knowing that Terminix is part of a \$3.5 billion company."; "Terminix International is backed by
8 the immense financial strength of ServiceMaster, a fortune 500 company." (See exhibit 7,
9 Gershtenecker renewal notice).

10 **ANSWER:** Defendants admit that certain of Terminix's sales and renewal literature
11 make certain references to support provided by ServiceMaster to Terminix, and the terms of such
12 documents speak for themselves. Further responding, Defendants state that the remaining
13 allegations contained in Paragraph 19 of plaintiff's Amended Complaint consist of legal
14 conclusions requiring no response. To the extent said allegations are construed as requiring a
15 response, Defendants deny said allegations.

16 20. ServiceMaster publishes, backs, and supports the customer satisfaction guarantees
17 provided by Terminix to all Terminix customers (See [http://www.servicemaster.com/](http://www.servicemaster.com/library/aboutUs/guarantees/terminix.dsp)
18 [library/aboutUs/guarantees/terminix.dsp](http://www.servicemaster.com/library/aboutUs/guarantees/terminix.dsp), at which Service Master provides a 100% satisfaction
19 guaranty to all customers of Terminix, attached hereto as Exhibit 8).

20 **ANSWER:** Defendants admit that certain of Terminix's sales and renewal literature
21 make certain references to support provided by ServiceMaster to Terminix, and the terms of such
22 documents speak for themselves. Further responding, Defendants state that the remaining
23 allegations contained in Paragraph 20 of plaintiff's Amended Complaint consist of legal
24 conclusions requiring no response. To the extent said allegations are construed as requiring a
25 response, Defendants deny said allegations.

26 21. Upon information and belief, and by their own admissions and practice,
27 ServiceMaster acts as a co-maker, guarantor, and/or surety either directly or by estoppel of
28

1 Terminix.

2 **ANSWER:** Defendants state that the allegations contained in Paragraph 21 of
3 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
4 said allegations are construed as requiring a response, Defendants deny said allegations.

5 22. Terminix conducts business in the Northern District of California, including
6 Alameda County, and serviced Plaintiffs property out of its office located at 14458 Wick, San
7 Leandro, California, 94577.

8 **ANSWER:** Defendants admit that The Terminix International Company Limited
9 Partnership conducts business in the Northern District of California and in Alameda County,
10 California, and that it performed certain services a home located at or near 16073 Gramercy
11 Drive, in San Leandro, California. Further responding, Defendants deny the remaining
12 allegations contained in Paragraph 22 of plaintiff's Amended Complaint.

13 **JURISDICTION AND VENUE**

14 23. Jurisdiction exists pursuant to 28 U.S.C. § 1332(d)(2).

15 **ANSWER:** Defendants state that the allegations contained in Paragraph 23 of
16 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
17 said allegations are construed as requiring a response, Defendants deny said allegations.

18 24. Plaintiff is a citizen of the State of California, and Defendants are incorporated in,
19 or have their principal places of business, in the States of Delaware and Tennessee, and in this
20 class action the aggregate amount of damages shall exceed five million dollars.

21 **ANSWER:** Defendants state that they have insufficient knowledge upon which to base
22 a belief as to the truth or falsity of the allegation that plaintiff is a citizen of the State of
23 California. Further responding, Defendants admit that they are organized under the laws of the
24 State of Delaware and that their principal places of business are in Memphis, Tennessee. Further
25 responding, Defendants deny the allegation that the aggregate amount in controversy exceeds
26 five million dollars, and deny all other remaining allegations contained in Paragraph 24 of
27 plaintiff's Amended Complaint.

1 25. Venue is proper in this Court under 28 U.S.C. §§ 1391(a) because the events that
2 give rise to Plaintiffs claims took place within the Northern District of California.

3 **ANSWER:** Defendants state that the allegations contained in Paragraph 25 of
4 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
5 said allegations are construed as requiring a response, Defendants deny said allegations.

6 26. Pursuant to Civil L. R. 3-2(c), the Oakland Division of this Court is the
7 appropriate division because a substantial part of the events that give rise to the claim occurred in
8 Alameda County.

9 **ANSWER:** Defendants state that the allegations contained in Paragraph 26 of
10 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
11 said allegations are construed as requiring a response, Defendants deny said allegations.

12 **III. ADDITIONAL FACTS COMMON TO ALL COUNTS**

13 27. Defendants, by and through their agents, servants, and/or employees, and
14 Plaintiff, by and through her agents, servants, and/or employees, entered into a termite protection
15 contract in or about May, 1999 (hereinafter referred to as the "Contract," See Exhibit 1) related
16 to Plaintiffs home at 16073 Gramercy Drive, San Leandro, California, 94546.

17 **ANSWER:** Defendants admit that The Terminix International Company Limited
18 Partnership entered into a Sentricon Subterranean Termite Protection Plan on or around May 24,
19 1999 with Bruce Whitney and that the terms of said agreement speak for themselves. Further
20 responding, Defendants deny the remaining allegations contained in Paragraph 27 of plaintiff's
21 Amended Complaint.

22 28. Plaintiff and Defendants renewed the Contract annually in or about May, 2000;
23 May, 2001; May, 2002; May, 2003; May, 2004; and May, 2005 (renewal documents attached
24 hereto collectively as Exhibit 9).

25 **ANSWER:** Defendants admit that a Sentricon Subterranean Termite Protection Plan
26 entered into on or around May 24, 1999 with Bruce Whitney was renewed annually between
27 1999 and 2005. Further responding, Defendants deny the remaining allegations contained in
28

Paragraph 28 of plaintiff's Amended Complaint.

29. Defendants were obligated by the Contract to, inter alia:

(a) Provide the necessary services to control, protect, and help defend the identified property against, the attack of subterranean termites (and did not provide those services);

(b) Reinspect the structures when Terminix felt it was necessary (and did not do so);

(c) Extend service (i.e., renew the Contract) annually for the lifetime of the owner (Neu) upon the payment of annual renewal fees (and did not fulfill its duties during any contract extension);

(d) Continuously protect the identified property from new termite activity (and did not do so);

(e) Propose, if Terminix deemed it necessary in the event that the Baiting System failed to eliminate or control termite colonies, treatment using conventional termite elimination methods at no additional charge (when it knew before proposing the contract that such measures were necessary and therefore failed to meet its obligation to provide the "necessary services");

(f) To perform its services in accordance with the requirements of law (which it failed to do); and

(g) To provide state-of-the-art termite protection services (which it failed to do).

ANSWER: Defendants state that the obligations and terms of the Sentricon Subterranean Termite Protection Plan entered into between The Terminix International Company Limited Partnership and Bruce Whitney on or around May 24, 1999 speak for themselves. Further responding, Defendants deny the remaining allegations contained in Paragraph 29 of plaintiff's Amended Complaint.

30. In consideration for these and the other obligations of the Defendant pursuant to the Contract, Plaintiff paid an initial fee of \$1,548.00 and renewal fees of between \$220.00 and \$267.00 annually.

ANSWER: Defendants admit receiving an initial fee of \$1,548.00 from Bruce Whitney and renewal fees of \$232.00 annually between 2000 and 2004 and a renewal fee of \$267.00 in 2005. Further responding, Defendants state that the remaining allegations contained in Paragraph 30 of plaintiff's Amended Complaint are conclusions of law requiring no response.

1 To the extent said allegations are construed as requiring a response, Defendants deny said
2 allegations.

3 31. In addition to the above-listed obligations of the Defendant pursuant to the
4 Contract, Defendants owed to Plaintiff duties that arise out of California Structural Pest Control
5 laws and regulations as contained in the California Business and Professional Code section 8516
6 and sections 8560 et. seq. (2003) and California Code of Regulations section 1937 and sections
7 1990 et. seq. (2007). Defendants owed a duty to provide reasonably prudent and otherwise
8 proper and lawful performance of services, including but not limited to, an initial inspection and
9 one or more subsequent inspections of the identified property for the purpose of finding and
10 reporting any termite activity or conditions conducive to termite activity in accord with their
11 professional expertise and licensing requirements pursuant to the above referenced codes and
12 regulations and giving sound advice based on proper inspections.

13 **ANSWER:** Defendants state that the allegations contained in Paragraph 31 of
14 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
15 said allegations are construed as requiring a response, Defendants deny said allegations.

16 32. The Defendants owed a duty to give Plaintiff her money back if she was not
17 totally satisfied in accord with Defendants' guarantee of Plaintiff's total satisfaction (See
18 Renewal Notices, included in Exhibit 10 and the Marketing Materials, referred to below and
19 attached hereto as Exhibit 11)¹. However, Defendants knew that property owners relied upon
20 their expertise to determine if services were provided satisfactorily as consumers rely upon any
21 professional.

22 **ANSWER:** Defendants state that the allegations contained in Paragraph 32, including
23 footnote 1 thereof, of plaintiff's Amended Complaint consist of legal conclusions requiring no
24 response. To the extent said allegations are construed as requiring a response, Defendants deny
25 said allegations.

26
27 ¹ Plaintiff does not claim to have all marketing materials targeted to her and California
28 consumers, so the following list is merely a representative sample of false claims.

1 33. The Defendants owed a duty as a regulated and licensed professional to provide
 2 an expert service, and purported to provide, their service technicians with professional and
 3 extensive training pursuant to California Codes and Regulations for the licensing of Structural
 4 Pest Control Operators on termite biology and behavior, how termites forage, how termites share
 5 information with other colony members, what to look for at a feeding site, how to identify
 6 termite species, how to handle termites, and how to pay close attention to and provide the best
 7 possible termite protection for the identified property (See Exhibit 12, attached hereto). These
 8 requirements are detailed in title 16 of California Business and Professional Code section 8516
 9 and section 8560 et. seq. (2003) and California Code of Regulations section 1937 and sections
 10 1990 et. seq. (2007).

11 **ANSWER:** Defendants state that the allegations contained in Paragraph 33 of
 12 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
 13 said allegations are construed as requiring a response, Defendants deny said allegations.

14 34. The Defendants owed a duty to provide expert advice to the Plaintiff regarding
 15 termite protection services, including but not limited to provision of information about termites,
 16 termite control and elimination, and the danger termites posed to the identified property (See
 17 Exhibit 1, and Defendants' marketing materials, collectively referred to hereinafter as the
 18 "Marketing Materials," and attached hereto as Exhibits 9, 10, 11, 12 & 13), including, *inter alia*,
 19 the following, which were made at or about the time of the commencement of the Contract and
 20 thereafter at or about the time of the annual renewals of the Contract:

21
 22 (a) That the Sentricon "Baiting System" contained "bait" that would lure or attract
 23 termites to a poison that would kill any termite colony that might attack the home and
 that it was the only "necessary service" to control or protect against termites;

24 (b) By using a company with its expertise, the customer could be assured that it
 would provide all services necessary to control and prevent termite infestation;

25 (c) At the same time it mailed Plaintiff assurances that the "Baiting" System which
 26 was not really a "bait" was all that was necessary, it was advising other California
 27 consumers that a Baiting System was not necessary and was not the best way to control
 or eliminate termites;

1 (d) That the Baiting System was the best defense against the threat of subterranean
termite infestations (which was not a universal truth);

2 (e) That the Defendants formulated a unique plan of action for defending Plaintiff's
3 home against termite infestation;

4 (f) Baiting System customers like Neu were told it was the most effective
5 subterranean termite control or elimination technique available when Defendants were
saying something different to other consumers at the same time in the same state;

6 (g) That the Baiting System would provide a guaranteed defense of Plaintiff's home
from subterranean termite infestation;

7 (h) That the Baiting System was the most advanced method for the elimination or
8 control of subterranean termites;

9 (i) That the Baiting System was an early warning system, akin to a fire alarm and a
burglar alarm, to monitor for the threat of subterranean termites at Plaintiff's home;

10 (j) That the Baiting System would destroy subterranean termites in [the termites']
11 home before they destroyed Plaintiff's home;

12 (k) That termites would be lured to the bait stations even if wood in the home had
already been found and was an abundant food source;

13 (l) That Bait Systems at neighboring houses could not be counted on to bait and
14 eliminate the colonies attacking her house and that the colonies attacking Plaintiff's home
needed to be baited by stations around her home - not a neighbor's.

15 (m) That university research documented that only the Baiting System would kill the
16 colonies that would eat the Plaintiff's house; and

17 (n) That the Defendants would provide the "necessary service" because Terminix had
18 experience in the use of termiticides and state-of-the-art techniques for the elimination or
control of subterranean termites, was the leading provider of termite control services in
the United States, and the most trusted choice for 75 years.

19 **ANSWER:** Defendants state that the allegations contained in Paragraph 34 of
20 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
21 said allegations are construed as requiring a response, Defendants deny said allegations. Further
22 responding, Defendants deny making the alleged representations at the time of commencement
23 of the agreement in question and/or at the time of any renewal.

24 35. The Defendants breached their duties described above, and the above-listed
25 representations regarding the effectiveness of the Baiting System were false, because the
26 Defendants did not provide the necessary services to Neu and in fact included contractual
27

1 provisions that the Defendants could argue would allow it not to have to use a "necessary
2 service" because Defendants' Baiting System was the only one Defendants agreed to provide.

3 **ANSWER:** Defendants deny the allegations contained in Paragraph 35 of plaintiff's
4 Amended Complaint.

5 36. The Defendants did not provide and did not intend to provide all "necessary
6 services" to prevent termite attack. For example, Terminix admits in sworn corporate testimony
7 in litigation in Arkansas that it knew it used chemicals like Pryfon in the past, which were
8 ineffective and rather than applying an effective chemical, it just collects money and leaves
9 homes unprotected for the sole reason that customers can file limited damage claims under
10 contracts or law when damages are discovered.

11 **ANSWER:** Defendants deny the allegations contained in Paragraph 36 of plaintiff's
12 Amended Complaint.

13 37. The Defendants, by virtue of their above-referenced knowledge and expertise in
14 entomology, termite behavior, termnitiocides, and termite control and elimination methods, knew
15 that an attack on any of the several bait stations around Plaintiffs home by termites from a
16 particular termite colony could not and did not eliminate other colonies which may attack
17 Plaintiff's home.

18 **ANSWER:** Defendants deny the allegations contained in Paragraph 37 of plaintiff's
19 Amended Complaint.

20 38. The Defendants, knew or should have known with the exercise of reasonable care
21 that research studies had shown that baiting systems were ineffective for controlling or
22 eliminating termite infestations as represented. (See Exhibit 14).

23 **ANSWER:** Defendants deny the allegations contained in Paragraph 38 of plaintiff's
24 Amended Complaint.

25 39. The Defendants' above-listed representations regarding the effectiveness of the
26 Baiting System were false, unfair, deceptive and/or misleading and therefore in violation of
27 California Code of Regulations section 1999.5 (2007) which makes it unlawful for any SPCO
28

1 license holder to make statements or representations regarding the efficacy of any structural pest
2 control that is false, deceptive, unfair and / or misleading.

3 **ANSWER:** Defendants deny the allegations contained in Paragraph 39 of plaintiff's
4 Amended Complaint.

5 40. The Plaintiff will prove the foregoing allegations related to the Defendants'
6 breaches of duty and knowing misrepresentations through the Defendants' own records and
7 testimony, the testimony of expert witnesses, and accepted literature in the field regarding the
8 ineffectiveness of the Baiting System.

9 **ANSWER:** Defendants deny the allegations contained in Paragraph 40 of plaintiff's
10 Amended Complaint.

11 41. Plaintiff is informed and believes by virtue of the Defendants' own admissions
12 and practices that Defendants' knew the Baiting system was ineffective and that the only
13 practical method of controlling termites was by applying and then maintaining a "complete
14 chemical barrier" in accordance with California law and label requirements (See Exhibit 15).

15 **ANSWER:** Defendants deny the allegations contained in Paragraph 41 of plaintiff's
16 Amended Complaint.

17 42. Plaintiff is informed and believes by virtue of the Defendants' own admissions
18 and practices that Defendants' knew that without a complete and effective chemical barrier, in
19 accordance with label requirements, the likelihood of termite infestation was substantial in areas
20 like Arkansas or California with "very heavy" or "heavy" subterranean termite pressure. (See
21 Exhibit 15).

22 **ANSWER:** Defendants deny the allegations contained in Paragraph 42 of plaintiff's
23 Amended Complaint.

24 43. Defendants, by and through their agents, servants, and or employees, uniformly
25 and continuously failed to conduct adequate initial inspections, annual inspections, and
26 reinspections for termite infestation or related damage and other wood destroying organisms as
27 required by contract and law and which were relied upon by Plaintiff.

1 **ANSWER:** Defendants deny the allegations contained in Paragraph 43 of plaintiff's
2 Amended Complaint.

3 44. Defendants, by and through their agents, servants, and or employees, uniformly
4 and continuously failed to perform the initial protection services that would be reasonably
5 effective to prevent subterranean termite infestation, including elimination of conducive
6 conditions (and advise on the necessity of alteration of such conditions) prior to application of
7 chemical or other prevention or control measures such as alterations to structures or foundation
8 areas so as to make application of a complete chemical barrier an effective preventative or
9 control measure against termites, and failure to apply chemical as required by labels and good
10 practice and company policy and failure to reapply chemicals when disruption of barriers
11 occurred.

12 **ANSWER:** Defendants deny the allegations contained in Paragraph 44 of plaintiff's
13 Amended Complaint.

14 45. Defendants, by and through their agents, servants, and or employees, intentionally
15 created a scheme and system which has promoted and led to widespread negligence, recklessness
16 and wantonness in the manner of termite prevention services and inspections, annual inspections,
17 re-inspections and certifications thereof.

18 **ANSWER:** Defendants deny the allegations contained in Paragraph 45 of plaintiff's
19 Amended Complaint.

20 46. Defendants, by and through their agents, servants, and or employees, engaged in a
21 practice of representing that they had developed a system that would "lure" termites to stations
22 containing a poison "bait" that would eliminate termite colonies when they knew that because of
23 the random foraging patterns of subterranean termite colonies that the wood in plastic tubes laced
24 in the ground did not act as a lure or bait for termites. Defendants knew the product did not
25 "bait" termites but instead that termites would have to randomly stumble upon the "traps" to
26 have any effect and that disturbing infested wooden stations could cause termites to abandon the
27 site and falsely advertised and sold prevention and control services as baits without providing
28

1 bait for termites.

2 **ANSWER:** Defendants deny the allegations contained in Paragraph 46 of plaintiff's
3 Amended Complaint.

4 47. The Defendants followed a practice of including definitions with repair contracts
5 in combination with business practices that would cause the conditions for coverage not to be
6 met which is and was a deceptive and unfair practice. For example, the repair promise was
7 conditioned upon a Terminix employee finding live termites when the practice of the company
8 was to kill live termites before the extent of live termites could be discovered by the property
9 owner and when termites could damage wood during the contract term without being present at
10 the time of inspection.

11 **ANSWER:** Defendants deny the allegations contained in Paragraph 47 of plaintiff's
12 Amended Complaint.

13 48. Defendants, by and through their agents, servants, and or employees,
14 intentionally, recklessly, wantonly and/or negligently suppressed the fact that the entirety of
15 Plaintiffs house had not received the termite treatment for which Plaintiff had contracted at the
16 beginning of the relationship. Defendants have refused to make proper remedial treatments
17 and/or repairs to the home every day since the original treatment, causing a new breach or tort
18 each day thereafter through a course of active concealment of wrongdoing in the face of a duty
19 of disclosure and, therefore, have lulled the Plaintiff and class members into believing the
20 property received the service promised.

21 **ANSWER:** Defendants deny the allegations contained in Paragraph 48 of plaintiff's
22 Amended Complaint.

23 49. Defendants routinely followed a practice of including unfair, illegal, and
24 unconscionable clauses in their consumer contracts such as remedy stripping clauses and
25 arbitration clauses containing class action bans and limitations on remedies. Clauses containing
26 these types of restrictions are unconscionable and unenforceable under California Law, including
27 illustrative examples from Plaintiff's Contract:

1 (a) Limiting service to a method that Defendants knew was not necessarily the
"necessary service";

2 (b) Defining new damage covered in a manner that has no reasonable or fair scientific
3 basis (i.e., the definition of "new" damage throughout);

4 (c) Inclusion of "recitals" of "Purchaser Understanding" of characteristics of termite
5 habits and biology and the alleged means of operation and characteristics of the Baiting
System which are beyond the reasonable understanding of non-expert consumers;

6 (d) Unconscionable arbitration clause which fails the chosen forum's "Due Process
Protocol for Consumer Agreements";

7 (e) Limitation of liability clauses;

8 (f) Shifting attorney fees and all expenses of Terminix to consumers who sue
9 Terminix for anything other than for maintenance of the Baiting System or for the limited
10 property damages specified in the contract even where Terminix is accused of not
providing the service it provided;

11 (g) Representations that "retreatments" of termite infestations can be accomplished
by the Baiting System; and

12 (h) Unilateral Right of Cancellation clause buried in a "Change of Law" paragraph
13 (#7 of Terms and Conditions) when the main body says the contract is renewable for life.

14 **ANSWER:** Defendants deny the allegations contained in Paragraph 45 of plaintiff's
15 Amended Complaint.

16 46 [sic]. ServiceMaster uniformly and continuously controlled and directed the
17 aforementioned conduct and omissions of Terminix.

18 **ANSWER:** Defendants deny the allegations contained in the misnumbered Paragraph
19 46 of plaintiff's Amended Complaint.

20 50. The foregoing activities, concealment, and patterns and practices, have been
21 known to, authorized, directed and controlled by, ServiceMaster and have been sanctioned,
22 approved and/or condoned, and allowed to continue even after investigating said alleged
23 practices.

24 **ANSWER:** Defendants deny the allegations contained in Paragraph 50 of plaintiff's
25 Amended Complaint.

26 51. Defendants, by and through their agents, servants, and or employees, have held
27 themselves out to Plaintiff, or their predecessor(s) in interest, as being experts in the field of
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1 termite infestation treatment and inspection in advertisements and other publications directed at
2 the residents of this state and by virtue of the activities they undertook as licensed Structural Pest
3 Control Operators ("SPCO's").

4 **ANSWER:** Defendants admit that The Terminix International Company Limited
5 Partnership is held out to the public as having the expertise necessary to perform the services
6 contracted for in its termite service agreements. Further responding, Defendants deny the
7 remaining allegations contained in Paragraph 51 of plaintiff's Amended Complaint.

8 52. Defendants uniformly represented in standardized printed material and by their
9 actions that Plaintiffs property had been properly treated and otherwise protected from termite
10 infestation using the highest standards and that services were provided in compliance with law.

11 **ANSWER:** Defendants admit that it properly performed all services required under the
12 Sentricon Subterranean Termite Protection Plan entered into with Bruce Whitney on or around
13 May 24, 1999. Further responding, Defendants deny the remaining allegations contained in
14 Paragraph 52 of plaintiff's Amended Complaint.

15 53. Defendants have preyed upon and exploited the Plaintiffs lack of expertise, as it
16 relates to proper termite treatment, inspection, re-inspection and re-treatment.

17 **ANSWER:** Defendants deny the allegations contained in Paragraph 53 of plaintiff's
18 Amended Complaint.

19 54 Defendants actively concealed their practices, schemes and wrongdoing, took
20 steps to make it appear as if there was no wrongdoing, and engaged in other activities by reason
21 of which the tolling of all applicable statutes of limitation is appropriate and required.

22 **ANSWER:** Defendants deny the allegations contained in Paragraph 54 of plaintiff's
23 Amended Complaint.

24 **IV. CLASS ACTION ALLEGATIONS**

25 55. This action is brought by the named Plaintiff as a class action, on her own behalf
26 and on behalf of all others similarly situated ("the Class"), under the provisions of Rule 23 of the
27 Federal Rules of Civil Procedure.

1 **ANSWER:** Defendants state that the allegations contained in Paragraph 55 of
2 plaintiff's Amended Complaint consist of legal conclusions requiring no response. To the extent
3 said allegations are construed as requiring a response, Defendants deny said allegations.

4 56. The Class is comprised of all individuals, proprietorships, partnerships,
5 corporations, and other entities (hereinafter 'persons and entities') that own any home,
6 condominium, apartment complex, commercial building, or other structure, and/or improvements
7 to real property (hereinafter referred to as "structure") located in the State of California who have
8 purchased contracts and/or warranties from Defendants for termite control service or whose
9 contracts with other providers have been purchased or assumed by Defendants, which contain
10 provisions substantially similar to Plaintiffs. Excluded from the Class are all claims by any
11 persons or entities that have already commenced an individual civil action against Defendants
12 related to the subject matter of this litigation. Also excluded from the Class are the following:
13 Defendants; any parent, subsidiary, affiliate, or controlled person of Defendants; the officers,
14 directors, agents, servants or employees of any of the same; persons whose participation as a
15 class representative or member would require recusal of the hearing officer; members of the
16 judiciary assigned to this case and their relatives within the second degree of consanguinity; and,
17 the members of the immediate families of any such person.

18 **ANSWER:** Defendants deny that the purported class described in Paragraph 56 of
19 plaintiff's Amended Complaint describes a group of individuals and/or entities which satisfies or
20 is capable of satisfying the requirements for class certification under California and/or federal
21 law. Further responding, Defendants deny all remaining allegations contained in Paragraph 56
22 of plaintiff's Amended Complaint.

23 57. This action has been brought and may properly be maintained as a class action
24 under California law.

25 **ANSWER:** Defendants deny the allegations contained in Paragraph 57 of plaintiff's
26 Amended Complaint.

27 ///

58. Plaintiff is unable to state precisely the size of the Class, but is informed and believes that members of the Class number at least into the thousands. The Class is sufficiently numerous and dispersed throughout the state that joinder of all its members is impractical.

ANSWER: Defendants deny the allegation that joinder of all members of the putative class described in plaintiff's Amended Complaint is impractical. Further responding, Defendants have insufficient knowledge upon which to base a belief as to truth or falsity of the remaining allegations contained in Paragraph 58 of plaintiff's Amended Complaint and therefore, Defendants deny said allegations and demand strict proof thereof.

59. There are numerous common questions of law and fact with respect to Defendants and their contracts involving the Class members. Among these questions common to the Class are:

- (a) Whether Defendants provided necessary services for the control, prevention, eradication, and inspection for termites;
- (b) Whether Defendants, with respect to their contract for service, were negligent in the execution of the service that they were to provide and/or failed to provide the services promised or otherwise required;
- (c) Whether Defendants collected money without providing the services they were obligated to provide;
- (d) Whether Defendants engaged in a pattern and practice of replacing existing service contracts with other service contracts to improperly excuse prior breaches of duties, limit liability, discourage collectively seeking remedies that may be infeasible to seek individually, and with other terms more favorable to Defendants;
- (e) Whether Defendants illegally raised and collected annual renewal fees;
- (f) Whether Plaintiff and class members are entitled to recover compensatory damages;
- (g) Whether Plaintiff and class members are entitled to recover equitable relief;
- (h) Whether Plaintiff and class members are entitled to recover punitive damages; and
- (i) Whether contracts should be equitably reformed;

ANSWER: Defendants deny the allegations contained in Paragraph 59 of plaintiff's Amended Complaint, including all sub-paragraphs.

1 60. Class action treatment provides a fair and effectual method for the adjudication of
2 the controversy here described, affecting a large number of persons, the joinder of whom is
3 impracticable. The class action provides an effective method whereby the enforcement of the
4 rights of Plaintiff and members of the Class can be fairly managed without unnecessary expense
5 or duplication.

6 **ANSWER:** Defendants deny the allegations contained in Paragraph 60 of plaintiff's
7 Amended Complaint.

8 61. If Class members were to pursue individual litigation, it would be unduly
9 burdensome to the courts within which the individual litigation would proceed. Individual
10 litigation would magnify the delay and expense to all parties in the court system by resolving the
11 controversy engendered by Defendants' course of conduct with respect of its contract. By
12 contrast, the class action device presents far fewer management difficulties and provides the
13 benefits of unitary adjudication, economies of scale, and comprehensive supervision by a single
14 court. Concentrating this litigation in one forum will aid judicial economy and efficiency,
15 promote parity among the claims of the individual Class members and result in judicial
16 consistency. Notice of the pendency and any resolution of this action can be provided to the
17 Class members by publication and direct mailing upon discovery of Defendants' files.

18 **ANSWER:** Defendants deny the allegations contained in Paragraph 61 of plaintiff's
19 Amended Complaint.

20 62. The expense and burden of individual litigation of a case of this magnitude make
21 it impractical for individual Class members to seek redress for the wrongs done to them and
22 therefore requires consolidation of all such claims in one action.

23 **ANSWER:** Defendants deny the allegations contained in Paragraph 62 of plaintiff's
24 Amended Complaint.

25 63. The claims of Plaintiff, as the Class Representative, are typical of the claims of
26 the members of the Class.

27 ///

ANSWER: Defendants deny the allegations contained in Paragraph 64 of plaintiff's Amended Complaint.

ANSWER: Defendants deny the allegations contained in Paragraph 65 of plaintiff's Amended Complaint.

ANSWER: Defendants deny the allegations contained in Paragraph 66 of plaintiff's Amended Complaint.

Breach of Contract and Warranty

ANSWER: Defendants adopt, reallege and incorporate by reference their responses to Paragraphs 1-66 of plaintiff's Amended Complaint as their response to Paragraph 67, as though fully set forth herein.

68. Plaintiff and the Class entered into written contracts with Defendants and undertook obligations, paying premiums in full, renewing annually, and fully performed all obligations under the contracts.

ANSWER: Defendants admit that The Terminix International Company Limited Partnership entered into a Sentricon Subterranean Termite Protection Plan on or around May 24, 1999 with Bruce Whitney and that the terms of said agreement speak for themselves. Further responding, Defendants deny the remaining allegations contained in Paragraph 68 of plaintiff's Amended Complaint.

69. The conduct herein alleged breaches, and has breached, the provisions of Defendants' contracts with Plaintiff and the Class and Plaintiff's and the Class's predecessor(s) in interest, and the standardized warranties afforded Plaintiff and the Class under their contracts.

ANSWER: Defendants deny the allegations contained in Paragraph 69 of plaintiff's Amended Complaint.

70. Plaintiff and class members have incurred damages proximately caused by Defendant's breaches of statutory and contractual duty, breaches of warranty, and misconduct described herein.

ANSWER: Defendants deny the allegations contained in Paragraph 70 of plaintiff's Amended Complaint.

COUNT TWO

Professional Negligence, Wantonness and Recklessness (including negligent training, supervision and retention)

Defendants make no response to the allegations contained in Count Two (Paragraphs 71-83) of plaintiff's Amended Complaint for the reason that said count and said allegations were dismissed by the Court on July 24, 2008.

COUNT THREE

California UCL (Business and Professions Code § 17500 *et seq.*)

Defendants make no response to the allegations contained in Count Three (Paragraphs

84-88) of plaintiff's Amended Complaint for the reason that said count and said allegations were dismissed by the Court on July 24, 2008.

COUNT FOUR

California UCL

(Business and Professions Code § 17200 *et seq.*)

Defendants make no response to the allegations contained in Count Four (Paragraphs 89-92) of plaintiff's Amended Complaint for the reason that said count and said allegations were dismissed by the Court on July 24, 2008.

COUNT FIVE

Violation of Consumers Legal Remedies Act (Civil Code § 1750, *et seq.*) – All Defendants

Defendants make no response to the allegations contained in Count Five (Paragraphs 93-101) of plaintiff's Amended Complaint for the reason that said count and said allegations were dismissed by the Court on July 24, 2008.

PRAYER FOR RELIEF

Defendants, TERMINIX INTERNATIONAL, INC., THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, THE SERVICEMASTER COMPANY, SERVICEMASTER CONSUMER SERVICES, INC., and SERVICEMASTER CONSUMER SERVICES LIMITED PARTNERSHIP, deny that the plaintiff or the class she purports to represent are entitled to any recovery or any relief whatsoever against the Defendants. Defendants request recovery of court costs and all other just and appropriate relief.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the applicable statute(s) of limitations.

SECOND AFFIRMATIVE DEFENSE

Defendants substantially performed all obligations under the applicable agreement, thereby barring plaintiff's claims in whole or in part.

THIRD AFFIRMATIVE DEFENSE

Plaintiff failed to perform all conditions and/or obligations required under the applicable agreement, thereby barring her recovery in whole or in part.

FOURTH AFFIRMATIVE DEFENSE

Certain damages for which plaintiff seeks recovery are excluded by the terms and conditions of the agreement in question.

FIFTH AFFIRMATIVE DEFENSE

Defendants have validly disclaimed liability for the damages claimed.

SIXTH AFFIRMATIVE DEFENSE

The Court lacks subject matter jurisdiction over this action, entitling Defendants to dismissal of all claims.

SEVENTH AFFIRMATIVE DEFENSE

The Court lacks personal jurisdiction over one or more of the Defendants, thereby entitling that Defendant(s) to dismissal of the claims against it.

EIGHTH AFFIRMATIVE DEFENSE

The agreement in question contained a valid and enforceable arbitration provision which covers the parties' dispute, thereby requiring dismissal or a stay of the action.

NINTH AFFIRMATIVE DEFENSE

Plaintiff has failed to mitigate her damages, thereby barring her recovery in whole or in part.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any, are the result of acts or omissions of third parties unrelated to Defendants and for whose conduct Defendants are not responsible.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff lacks privity with one or more of the Defendants, thereby barring plaintiff from recovery.

TWELFTH AFFIRMATIVE DEFENSE

Defendants reserve the right to plead further Affirmative Defenses as additional information becomes known through the completion of discovery.

DEMAND FOR JURY TRIAL

Defendants demand trial by jury.

DATED: August 4, 2008

Respectfully submitted,

HINSHAW & CULBERTSON LLP

/s/ Christopher J. Borders

CHRISTOPHER J. BORDERS

Attorneys for Defendants

TERMINIX INTERNATIONAL, INC.,
THE TERMINIX INTERNATIONAL COMPANY
LIMITED PARTNERSHIP (erroneously sued
herein as The Terminix International Company),
THE SERVICEMASTER COMPANY,
SERVICEMASTER CONSUMER SERVICES, and
SERVICEMASTER CONSUMER SERVICES
LIMITED PARTNERSHIP